No. 3640

United States
Circuit Court of Appeals

For the Ninth Circuit

ROBERT DAVIS and O. A. DODSON,
..Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Plaintiffs

Brief of ~~Defendant~~ in Error

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The only error assigned on this appeal is that the Court erred in overruling defendants' motion in arrest of judgment. R. p. 30.

The motion in arrest of judgment raised the sole question of the sufficiency of the indictment to support the verdict. R. p. 25.

An insufficient indictment will not support a verdict of conviction, notwithstanding the provisions of Section 1025 R. S.

United States vs. Carll, 105 U. S. 612,

Dunbar vs. United States, 156 U. S. 192.

The charge in the indictment here is that the defendants "did knowingly, wilfully, corruptly, fraudulently and feloniously, conspire, combine, confederate, and agree together and with various and sundry other persons to the Grand Jurors unknown, to commit an offense against the United States, to-wit: the offense of knowingly, wilfully and unlawfully transporting, selling, bartering, furnishing and possessing intoxicating liquors, namely, whiskey, containing alcohol in excess of one-half of one per cent by volume, in violation of the Act of Congress, entitled, "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries," commonly known as the "National Prohibition Act of October 28, 1919." R. p. 6.

The provisions of the Act of October 28, 1919, (41 Stat. L. 305) relative to transportation of liquor are in Section 3, Title 2, as follows:

> "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in

this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

"Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: Provided, that nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts."

Section 3 provides a lawful, as well as an unlawful, purpose for which liquor may be transported, and makes the negative of the lawful purpose the very heart of the definition of the unlawful purpose, to the end that the purpose of the section, and of the whole Act, as there declared, shall be accomplished.

The indictment does not charge that it was not intended to transport liquor "for nonbeverage purposes" "as authorized in this Act."

The declaration in Section 3 that "all the provisions of this Act shall be liberally construed"

does not extend to Section 37 of the Penal Code of 1910 defining conspiracy. Conspiracy is a distinct and substantive offense.

United States vs. Stevenson (1909, 215 U. S. 200),

Thomas vs. United States (C. C. A. 8th Cir. 1907 156 Fed. 897).

Guilty intent is essential to violation of Section 37. It is necessary that the minds of the conspirators meet in agreement, express or implied, to do acts *for the purpose* made unlawful by Federal Law. It is immaterial that the conspirators may not know that the intended acts are in violation of the Federal Law.

United States vs. Newton (S. D. Ia. 1892) 52 Fed. 275.

United States vs. Lyman (D. C. Ore. 1911) 190 Fed. 414.

> "If the purpose of the conspiracy be the doing of an act which is not an offense at common law, but only by statute, such purpose must be set forth in such a manner as to show that it is within the terms of the statute." 12 Corp. Juris. 619, Par. 196;
>
> United States vs. Sanger, 48 Fed. 78, (Appeal dismissed in 144 U. S. 310).
>
> United States vs. De Grieff, 25 Fed. Cas. No. 14, 936.
>
> "It will not be sufficient to allege in general terms, however strong, that the purpose

to be effected, was criminal or unlawful, nor that the means to be used, where their criminal character is relied on, were malicious or fraudulent or unlawful or criminal." 12 Corp. Juris, 623, Par. 200.

United States vs. Gardner, 42 Fed. 829.

The "means must be stated in such terms that the court may see they are unlawful at common law or by virtue of some statute." 12 Corp. Juris, 623.

"It is evident to any rational mind that under the decisions of the Supreme Court an indictment charging conspiracy must state an agreement to do acts with the intent *or for the purpose embraced within the intent specified in the statute creating the offense.* The existence of the intent cannot be left to inference."

United States vs. Green, 136 Fed. 659, (Affirmed 199 U. S. 601).

Pettibone vs. United States, 148 U. S. 196.

"It is an elementary rule of criminal law that where language does not constitute a crime, if uttered under some circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, in that the court can determine,

and not the pleader, whether or not they constitute the crime."

Fontana vs. United States, 262 Fed. 283, 288 citing:

United States vs. Hess, 124 U. S. 483;

United States vs. Couikshank, et al, 92 U. S. 542;

United States vs. Carll, 105 U. S. 611;

Shilter vs. United States, 257 Fed. 724, 725.

"It is a rule of general application that if an exception or proviso appears in the enacting clause of a statute it must be shown in an indictment or information founded upon the statute, by means of language negativing the exception, that the accused is not within the exception. Another, and perhaps more definite statement of the rule is that where a statute defining an offense contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, it must be shown that the accused is not within the exception." 14 R. C. L. 188, Par. 34, citing: numerous cases under foot notes 11 and 12.

In Edward S. Dryer, plaintiff, in Err. vs. People of the State of Illinois, (188 Ill. 40),

58 L. R. A. on page 872, an exception is pointed out in a way that more clearly demonstrates the rule of general application. In that case the court said: "The only objection urged against the indictment under the motion to quash was that it failed to negative the last proviso, namely, that it did not allege that the failure or refusal to pay over the money was not occasioned by unavoidable loss or accident. The rule as stated by this court is that "where an act is made criminal, with exceptions embraced in the same clause of the statute which creates the offense, so as to be descriptive of the offense intended to be punished, it is necessary in the indictment stating the act had been done, to negative the exceptions, so as to show affirmatively the precise crime defined has been committed;" also that "there are exceptions to this general rule, as where the exception or proviso be in a subsequent clause of the statute, or if in the same section, and not incorporated with the enacting clause by any apt words of reference, it is, in that case, a matter of defense, and need not be negatived in the pleading." Beasly vs. People, 89 Ill. 571.

"Counsel do not disagree as to this being a correct statement of the law as laid down by the uniform current of authority, but it is

insisted on behalf of plaintiff in error that the foregoing proviso is embraced in the same clause of the statute which creates the offense, is descriptive of the crime intended to be punished, and is incorporated with the enacting clause, and therefore the indictment should have charged that the failure or refusal was not occasioned by unavoidable loss or accident. The plain language of the statute, in our opinion, refutes this position. The definition of the offense intended to be punished, and the penalty denounced against it, are clearly stated in a complete sentence, wholly independent of either of the succeeding provisos. Although they are in the same section, they are not "incorporated with the enacting clause by any apt words of reference." The language, "if it appears," etc., clearly indicates an intention to allow an officer the benefit of such a defense, and not to require the state to allege and prove the negative. The construction insisted upon would practically destroy the efficacy of the law. It would be easy enough to make the allegation, but in many, if not more, cases, it would be impossible to make the negative proof. The motion to quash the indictment was properly overruled."

In State vs. Abbey (29 Vermont 60) 67 Am. Dec. 754, the Court said:

"The case of Commonwealth vs. Hart, I Lead. Crim. Case, 250 is a forcible illustration of the rule where exceptions in a statute should be, and where they are not required to be negatived. The act of 1852 in Massachusetts provided that 'no person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof, without being duly authorized, on pain of forfeiting," etc. "Provided, that nothing in the act shall be construed to prevent the manufacture or sale of cider for other purposes than that of a beverage, or the sale and use of the fruit of the vine for the commemoration of the Lord's Supper.' The words 'without being duly authorized' defined and qualified the act forbidden by the statute. It was not all sales or manufacture of intoxicating liquor which were forbidden, but only such as were unauthorized; hence the want of authority should be averred and proved, though it might involve the proof of a negative. But the matter embraced in the proviso did not define, qualify, nor was it descriptive of the matter prohibited in the enacting clause. When it was alleged in the indictment, and proved on trial, that the respondent was a common seller of spirituous and intoxicating liquors without being duly authorized, the

offense was fully made out; a prima facie case was alleged and proved, and it was for the defendant to prove that he was within any of the cases mentioned in the proviso."

The offense defined in Section 3 of the National Prohibition Act is apparently not difficult to charge or prove so far as the exception therein incorporated is involved.

In the Fontana case, 262 Federal 283, hereinbefore cited and quoted from, Judge Sanborn, on page 286, said: "The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading." Citing: Miller vs. United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Naftzger,

vs. United States, 200 Fed. 494, 502, C. C. A. 598, 604.

"It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction." Citing: United States vs. Britton, 107 U. S. 665, 669, 670, 2 S. U. P. Ct. 512, 27 L. E. D. 520; U. S. vs. Hess, 124 U. S. 483, 488, 8 S. U. P. Ct. 571, 31 L. E. D. 516; Miller vs. U. S., 133 Fed. 337, 341, 66 C. C. A. 399, 403; Armour Pkg. Co. vs. U. S. 153 Fed. 1, 16, 17, 82 C. C. A. 135, 150, 151, 14 L. R. A. (N. S.) 400; Etheredge vs. U. S., 186 Fed. 434, 108 C. C. A. 356; Winters vs. U. S., 182 Fed. 721, 722, 105 C. C. A. 163, 167.

Respectfully submitted,

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